



Case Western Reserve Journal of International Law

Volume 37 | Issue 2

2006

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Recommended Citation

Richard Goldstone, *Combating Terrorism: Zero Tolerance for Torture*, 37 Case W. Res. J. Int'l L. 343 (2006)

Available at: <https://scholarlycommons.law.case.edu/jil/vol37/iss2/10>

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COMBATING TERRORISM: ZERO TOLERANCE FOR TORTURE

Richard Goldstone [†]

In the short time available to me I would like to discuss the manner in which the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹ ("Torture Convention") influenced the approach of the United States with regard to torture, the oldest and most despicable of policing techniques. I will then turn to consider the effects of September 11th on this approach.

The starting point of any discussion of the role of international law and torture is the recognition that torture and other cruel or degrading treatment are prohibited. This prohibition is absolute and non-derogable.

Few countries have suffered more at the hands of terror attacks than Israel. The response of the Israel Supreme Court to torture has, however, remained uncompromising. It was put as follows by President Barak:

While terrorism poses difficult questions for every country, it poses especially challenging questions for democratic countries, because not every effective means is a legal means. I discussed this in one case, in which our Court held that violent interrogation of a suspected terrorist is not lawful, even if doing so may save human life by preventing impending terrorist acts.²

An Irish judge, Kingsmill-Moore J said, "To countenance the use of evidence extracted or discovered by gross personal violence would in my opinion, involve the State in moral defilement."³

In this country it is no different. In 1952 the US Supreme Court said:

Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions of-

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¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

² Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 148 (2002) (citing H CJ 5100/94 Public Committee Against Torture in Israel v. Israel [1999] IsrSC 53(4) 817).

³ *People v. O'Brien*, [1965] I.R. 142 (Ir.).

fend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.⁴

The Supreme Court has not departed from that approach.

The United States was one of the champions of the 1984 Torture Convention. In 1988, the United States supported universal jurisdiction against those who were suspected of violating the provisions of the Torture Convention. In its report to the Senate, the State Department said:

The United States strongly supported the provision for universal jurisdiction, on the grounds that torture, like hijacking, sabotage, hostage-taking, and attacks on internationally protected persons, is an offense of special international concern, and should have similarly broad, universal recognition as a crime against humanity, with appropriate jurisdictional consequences. Provision for 'universal jurisdiction' was also deemed important in view of the fact that the government of the country where official torture actually occurs may seldom be relied upon to take action.⁵

In its 1999 report to the United Nations Committee against Torture, the U.S. State Department stated:

Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention constitutes a criminal offense under the law of the United States . . . The United States is committed to the full and effective implementation of its obligations under the Convention throughout its territory.⁶

It is safe to assume that regularizing the use of torture would be regarded as immoral in all societies and is regarded as abhorrent by the overwhelming majority of people all over the world.

⁴ *Rochin v. California*, 342 U.S. 165, 173-74 (1952).

⁵ S. EXEC. REP. NO. 101-130, at 19 (1990) (recommending with three reservations, eight understandings, and two declarations that the Senate give advice and consent to ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

⁶ U.S. DEP'T OF STATE, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE AGAINST TORTURE ¶ 6 (1999), available at http://www.state.gov/www/global/human_rights/torture_intro.html, reprinted in U.N. Comm. Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, ¶ 6, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000), available at <http://documents-dds-ny.un.org/doc/UND/OC/GEN/G00/406/56/pdf/G0040656.pdf?OpenElement>.

A substantial majority of law enforcement officials do not believe that the use of torture produces reliable information. That is reflected in opinions of the U.S. Supreme Court.⁷

In recent years, with the increase of international terrorism, there has been a significant increase in the use of torture in attempts to counter this scourge. What is of deep concern is that this is happening in violation of the law and in democracies. It is also significant that the use of torture is usually accompanied by demonizing and dehumanizing the victims.

Experience in both democratic and oppressive societies demonstrates that law enforcement authorities will use torture and degrading treatment unless they fear the real prospect of being exposed publicly or, even more importantly, being punished for ordering or allowing its use.

The only efficient way to deter the use of torture is to enforce its prohibition throughout the political, legal and law enforcement branches of government. Torturers must be made unambiguously aware that there is zero tolerance for its use and that those who violate the prohibition will be appropriately punished. There are few countries where that is the policy.

Until recently, the United States was the role model leading the democratic world in outlawing torture. At least in theory there was zero tolerance for torture. Governments that permitted or tolerated torture were strongly criticized in the annual State Department reports on human rights around the world. Those reports often put oppressive governments to shame and in some cases this acted as a deterrent.

The United States generally considered itself a remote target of terrorists. The homeland was considered safe. That changed dramatically and tragically on September 11, 2001. In consequence, the United States has also changed its approach to the use of torture and forms of degrading and humiliating treatment. One consequence of this change is that the United States has abandoned its traditional leading role in outlawing torture. Indeed, today the growing tolerance for torture and degrading treatment of people held in detention by officials of the present administration is being used to justify far worse treatment in some oppressive societies.

As the United States abandons its leading role as the protector of human rights around the world, there is some hope that leadership is moving to the European Union. It is significant in this regard that all but two the fifty-five members of the Organization for Security and Co-Operation in Europe have ratified the Torture Convention and only three have not ratified the United Nations Convention on Civil and Political Rights.

There is also a growing role in this area for international human rights law, international tribunals and human rights organizations. It is not

⁷ See *Rochin*, 342 U.S. at 172-74; *Jackson v Denno*, 378 U.S. 368, 385-86 (1964); *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 472-73 (D.D.C. 2005).

surprising that it is in democracies that human rights organizations play the most effective roles. In open societies they are free to go about their business unfettered by oppressive security police. Their appeal to the public conscience at times cannot be ignored by politicians.

An insightful illustration of this kind of activity is the recent call by United States Health Professionals to prevent torture and the abuse of detainees in U.S. custody. In their statement one reads:

As health professionals whose work is devoted to promoting health and well-being, we . . . believe that torture and cruel, inhuman or degrading treatment are ethically and morally repugnant wherever and whenever they are inflicted. As the American Medical Association's Code of Medical Ethics provides, 'Physicians must oppose and must not participate in torture for any reason.' . . .

. . . .

We are particularly disturbed by the pattern of reported abuse: physical torture, such as beatings and shackling in stress positions, and psychological torture, such as mock executions, sleep and sensory deprivation, prolonged isolation, forced nudity, cultural and sexual humiliation, use of dogs to instill terror, threats of violence or death against detainees or their loved ones, and more. The US military has identified the deaths of at least 28 detainees as confirmed or suspected homicides. We are deeply concerned that, even as evidence of abusive treatment accumulates, current policies may continue to authorize the use of psychological torture and that these methods may still be in use.⁸

Physicians for Human Rights has recently published a comprehensive report on the use of psychological torture by the United States in the so-called "war on terror." It reviews the techniques used on detainees and the clinical experience of the long-lasting and devastating health consequences of psychological torture. Its conclusion is:

The Executive Branch must end and prohibit the use of psychological torture, withdraw legal opinions that permit psychological torture and replace them with an interpretation faithful to the federal criminal anti-torture statute, publicly disclose interrogation rules, hold perpetrators accountable, rehabilitate and compensate victims of torture, permit ongoing monitoring, and promote ethical practice by military medical personnel. The US Congress must establish an independent commission to investigate, carry out its oversight responsibilities, and enact appropriate legislation. Given the Administration's refusal to abide by law, its continued resistance to disclo-

⁸ Physicians for Human Rights, The U.S. Health Professionals' Call To Prevent Torture and Abuse of Detainees in U.S. Custody, <http://www.phrusa.org/no-torture/call.html> (last visited Feb. 26, 2006) (quoting CODE OF MED. ETHICS E-2.067 (1999)) (citing Douglas Jehl, *Pentagon Will Not Try 17 G.I.'s Implicated in Prisoners' Deaths*, N.Y. TIMES, Mar. 26, 2005, at A1).

sure of its activities or its rules, a truly independent investigation and means of accountability is required.⁹

More recently, on September 23, 2005, Human Rights Watch released a report containing accounts of three U.S. Army sergeants from the 82nd Airborne Division on abuses at a camp outside Fallujah, Iraq.¹⁰ They had seen at first hand the torture of Iraqi prisoners and blamed it on failed leadership.¹¹ Human Rights Watch also called for a comprehensive review of military abuses in Iraq.¹² It appears that these kinds of abuses continue even after the publicity and reaction in the wake of the Abu Ghraib photographs.¹³

On June 3, 2005, the U.S. Assistant Secretary of Defense for Health Affairs issued new ethical guidelines for all health care personnel, including physicians, nurses and medical practitioners. These guidelines are analyzed in detail in a carefully researched article that appears in the September 28, 2005, issue of *The Journal of the American Medical Association*.¹⁴ The article focuses specifically on "how the guidelines enable physicians to facilitate and monitor abusive interrogation practices and subvert well-established ethical duties to support health and human dignity."¹⁵ The conclusion is to the following effect:

US military officials' efforts to promulgate ethical guidelines that enable physician participation in coercive interrogation practices are inconsistent with international principles of medical ethics and, if unanswered by the medical community, establish a dangerous precedent. We believe that the vast majority of military physicians support international principles of medical ethics and do not wish to practice under untenable circumstances. The physician's duty to promote health and human dignity requires unity and action among both military and nonmilitary physicians to maintain the integrity of medical professional ethics and to earn the trust of those served.¹⁶

⁹ GRETCHEN BORCHELT & CHRISTIAN PROSS, PHYSICIANS FOR HUMAN RIGHTS, BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY U.S. FORCES 16 (2005).

¹⁰ HUMAN RIGHTS WATCH, LEADERSHIP FAILURE: FIRSTHAND ACCOUNTS OF TORTURE OF IRAQI DETAINEES BY THE U.S. ARMY'S 82ND AIRBORNE DIVISION (2005), available at <http://hrw.org/reports/2005/us0905/>.

¹¹ *Id.*

¹² Human Rights Watch, *New Accounts of Torture by U.S. Troops* (Sept. 24, 2005), <http://www.hrw.org/english/docs/2005/09/25/usint11776.htm>.

¹³ *Id.*

¹⁴ Leonard Rubenstein et al., *Coercive U.S. Interrogation Policies: A Challenge to Medical Ethics*, 294 JAMA 1544 (2005).

¹⁵ *Id.* at 1544.

¹⁶ *Id.* at 1548.

Human rights organizations, both international and domestic, have assumed an importance that would have been unimaginable only a decade ago. It was to their credit that the United Nations Security Council established the ad hoc criminal tribunals for the former Yugoslavia and Rwanda. It was a direct consequence of their shaming the leaders of the Western world into doing something in response to ethnic cleansing in the Balkans. They have played a similar role with regard to the establishment of the International Criminal Court ("ICC") and, more recently, the reference by the Security Council of the situation in Darfur to the ICC. If the United States is again to become the leader of the free world and the prime respecter and protector of fundamental human rights, non-governmental organizations in this country and in civil society in general have a crucial role to play.

In conclusion, I would suggest that the recognition of the human dignity of all people regardless of their origin, religion or color is fundamental to democracy. Torture is the most extreme example of the denial of human dignity. That is what makes it abhorrent to decent people. It is essential that there is an uncompromising call by Americans for all forms of torture and degrading treatment to be absolutely prohibited and for the human dignity of all people to be recognized and protected.